No. 11877.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

VAN CAMP SEA FOOD COMPANY, INC., a corporation,
Appellant,

vs.

ANTHONY DILEVA, IVAN JURJEV, MARIE DILEVA, MIKE DILEVA, SALVATORE DILEVA, JACK OLSEN, MARINO TRANSATTI, ANGELO CASTAGNOLA, CHIGI ROMOLIO, SALVATORE CARNAVALE, MATTEO BOLOGNA, PASQUALE GUGLIELMO and PIETRO COLOMBO,
Appellees.

APPELLEES' BRIEF.

FILED
JUL 31 1948
P. O'BRIEN,
CLERK

HERBERT R. LANDE,
413 West Seventh Street, San Pedro,
Proctor for Appellees.

Parker & Company, Law Printers, Los Angeles. Phone TR. 5206.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Cases

Statutes

Textbooks

No. 11877.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

VAN CAMP SEA FOOD COMPANY, INC., a corporation,

Appellant,

vs.

ANTHONY DILEVA, IVAN JURJEV, MARIE DILEVA, MIKE DILEVA, SALVATORE DILEVA, JACK OLSEN, MARINO TRANSATTI, ANGELO CASTAGNOLA, CHIGI ROMOLIO, SALVATORE CARNAVALE, MATTEO BOLOGNA, PASQUALE GUGLIELMO and PIETRO COLOMBO,

Appellees.

APPELLEE'S BRIEF.

This cause was first tried by Judge Harrison in the District Court. At the conclusion of the trial, he wrote a memorandum opinion [A. 14] in which he held that the appellant's vessel, the Gloria R, was solely at fault in the collision, and further stated that it had been *intimated* that the Gloria R was chartered to third persons, and if so, that such third persons should be brought in, to the relief of appellant. The Judge did this for the benefit of appellant [A. 319], contemplating that such third persons would occupy an adverse position to that of appellant [A. 319].

therefore that issue as to the status of the Gloria R and her crew was completely eliminated from the case.

Thus the only common question of fact before the Judges was the fault of the vessels, and both Judges found the Gloria R to be at fault.

There can be but *one* set of Findings of Fact and Conclusions of Law in any case. There was only one in this case. On appeal, the facts found must be taken as true, if supported by substantial evidence.

II.

The District Court Did Not Err in Holding That Appellees Had a Cause of Action Against Appellant.

A. Appellant Was the Owner of Both Vessels and the Employer of Both Crews.

The Findings of Fact, paragraphs I, II, III and IV [A. 42], expressly found that the appellant owned both the Bessemer and the Gloria R, and was the employer of both crews.

The finding that the crew of the Bessemer were employees of the appellant at time of collision completely overrules any possible finding that the vessel was operating under the charter made on September 11, 1941, expired October 1, 1942. (*This charter was never introduced into evidence,* being marked *for identification only* [A. 89].)

If the Bessemer were chartered to another, the crew would be employees of the charterer, not the owner, Van Camp Sea Food Company, Inc., appellant herein.

B. The Crew of the Bessemer Had a Cause of Action Against the Owners and Operators of the Gloria R.

When at sea, the master of the crew of the Gloria R were under a legal duty to obey the rules of the road and martime law, and to avoid colliding with the Bessemer, as well as any other vessel, in violation thereof.

The District Court found that the Gloria R breached that duty to the Bessemer, and that a collision resulted which was the fault of the Gloria R.

For every breach of duty, the law gives a remedy, in damages or otherwise, to the injured parties.

The Bessemer was damaged in said collision, she was laid up for repairs during the sardine fishing season, and as a result, the crew lost ten calendar days during the repair period. That loss of time was a real loss to the crew. If the collision were caused by a vessel owned by a stranger, there can be no doubt that the crew would be compensated in damages against the vessel at fault, and her owners under the *respondeat superior* doctrine.

In this case, the owner of the Gloria R was also the owner of the Bessemer and employed both crews.

Appellees submit that while they and the crew of the Gloria R had a common employer, *they were not in common employment* and therefore the fellow-servant rule does not apply; that the activities of the Gloria R on the high seas was one enterprise, under the master and crew of the Gloria R; and that of the Bessemer was distinctly another venture. Therefore, appellees did not assume the risk of negligent navigation by the crew of the Gloria R.

The rule which appellant really seeks to invoke to destroy appellees' cause of action is the fellow servant doctrine that one servant cannot sue his employer for the torts of his fellow servant. (As to personal injuries, the rule has been revoked by the Jones Act, 33 U. S. C. A. 688.) But the fellow servant rule has this all important restriction: That the servants must have a common master, and must be engaged in the same enterprise.

As stated in *Prosser, Torts,* p. 516:

> *"If they were employed in separate departments of the same enterprise, the prevailing view was that they were not to be considered fellow-servants,* unless their work was so related that they were likely to be in proximity to one another, and some special risk was to be anticipated toward one if the other were negligent." (Emphasis added.)

A case precisely in point is *The Petrel* (1893), L. R. P. 326, 62 L. J. P. 92, which involved the crews of two commonly owned vessels, one of which negligently collided with the other. The crew of the innocent vessel sued for loss of personal effects and the exact defense was made in that case that appellant makes here. The opinion in *The Petrel* case held:

> "I think therefore that probably no more complete definition can be formulated than is offered by the language of Blackburn, J., 'The consideration that the risk of injury to one servant is the natural and necessary consequence of misconduct in the other implies that the skill and care of the one is of special importance to the other by reason of the relations between their services.'
>
> "Tried by this principle, can it be said that the safety of the captain of one ship of a company is in

the ordinary and natural course of things dependent on the skill and care of the captain of another ship of the same company, or that injury by the negligence of one is an ordinary risk of the service of the other? In some cases it might, perhaps. For example, it might if all the ships of the company were in the habit of meeting at the same dock, and the safety of each thus became, in the ordinary course of things, dependent upon the skill with which the other was navigated. But in regard to navigation on the high seas, or in the estuary of the Thames, would a captain of one ship of the General Steamship Navigation Company have more reason to be interested in the skill of a captain of another ship of the company than in that of the masters of the myriad other craft in whose vicinity he might happen to navigate? By no reasonable supposition can it be imagined that he would. I think, therefore, that these two captains were not in common employment."

Not being in common employment, the crew of the damaged vessel was granted recovery against the owner of the guilty vessel, their employer.

The argument advanced by appellant to defeat recovery in this case is, appellees, submit, without merit. Appellant admits that if the Gloria R was owned by a third person, recovery would be conceded. In such a case, the owners of the Bessemer would sue for loss of time suffered by themselves and the crew; but here, appellant argues, the owner of one vessel cannot sue himself as owner of another vessel, in such a case there could be no suit and so nothing for the crew.

But right there is where the fallacy lies. In the case of suit against a third person, the owners sue on behalf of themselves and on behalf of the crew. In so far as the crew is concerned, the owners are *trustees* of that part of the cause of action representing the crew's loss. As said by this Court in *The Lydia,* 21 F. (2d) 683:

> "It is clear from the foregoing and other like decisions that the funds received by the owners in a case such as this are *charged with a trust* for the payment of the claims of the officers and crew of the vessel." (Emphasis added.)

In *U. S. v. Peterson,* 28 F. (2d) 29, the Court said in a similar case:

> "Under the facts, it became the right and duty of the owners of the ship to bring action. *They are trustees for any money that may be recovered for damages caused by the interference with the voyage, and are charged with a trust for the payment of the claims of the officers and crew of the vessel."* (Emphasis added.)

Since the owner-trustee is legally incapacitated to sue for the benefit of his *cestui que trust,* it is elementary equity law that the beneficiary may sue in his own name. That is precisely what the crew has done here, the libelant is a member of the crew and sues in his own name and for the benefit of the remainder of the crew.

The cases involving subrogation of insurers in collision cases are not in point at all here, because the crew of the

Bessemer were not recipients of any rights by way of subrogation. The loss of fishing time was a direct, primary loss which each fisherman suffered.

A somewhat analogous case to the one at bar is the one involving the salvaging of one vessel by the crew of another vessel which is owned by the same person as the distressed vessel. It is settled that recovery will be allowed in such a case, common employer notwithstanding.

Rees et al. v. United States, 134 Fed. 146;

Jacobson v. Panama Co., 266 Fed. 344.

The cases cited by appellant do not support its position. The actual points involved in all of them were on *pleading* questions as to proper or necessary parties plaintiff. The present day rule as to parties is that the real parties in interest are the proper parties plaintiff (Rule 17a of Rules of Civil Procedure, Rule 37 of Equity Rules). *Lewis v. Chadburne,* 54 Me. 484, was decided in 1865; *Grazier v. Atwood,* 4 Pick. (Mass.) 234, in 1826; certainly rules of pleading has been liberalized since then. It can hardly be conceived that today a court would non-suit a plaintiff because he sued in his own name for a recovery that was due him. Likewise, the case of *Baxter v. Rodman* (1826), 3 Pick. (Mass.) 435, actually only decided that the owner could bring a representative suit for himself and crew. *Taber v. Jenny* (D. C. Mass. 1865), 23 Fed. Cas. 13270, is not good law on pleading; the present day rule as to real parties in interest was developed to remedy the very situation created by such a case as the cited one.

At any rate, none of the cases cited by appellant deal with a situation where the owner of the vessel was incapacitated to sue on behalf of his crew.

Appellees do not contend that they have actual title to any fish caught. The cases cited by appellants only deal with the question of title to such fish. Appellees do contend that they have a contract right to be paid wages out of such catch. It is necessary to note, though, that fishermen have a lien *in rem* against the fish caught for their wages, computed on a share basis (56 Corp. Juris 1065). Appellees contend that as a result of the tort of appellant's employees, they lost the chance to fish for ten days. That "chance to fish" had an economic value to appellees; it was a chance to earn wages, and that economic value is compensated by damages *when tortiously interfered with.*

Appellants argue that before there is a duty to share the profits, there must be a showing that there are profits, and that when two boats of the same ownership collide, the owner has made no profits, but a loss to the extent each boat is damaged. Our answer is that the loss to the owner is self-evident, and that the question in this case goes further; the owner has sustained a further loss because of his responsibility for acts of his employees on the Gloria R.

Suppose the Bessemer were hit by a vessel owned by a third party. The appellants would have made no profits during the time she were laid up for repairs, but certainly the appellant would sue for and recover damages for loss

of fishing time. Their recovery would be partly their own, and partly for the crew, *who also lost fishing time*. If the crew have the right to recover, even through the mechanics of the owner suing for their benefit, for loss of fishing time when such is due to the fault of a stranger-owned vessel colliding with their vessel, they do not lose that right merely because the vessel at fault was also owned by their employer. Only the mechanics need be altered. Instead of the owner of their vessel suing to recover for their benefit, the crew sues in their own name and on their own behalf, not their employer, as such, but the owner and employer of the offending vessel, who by chance happens to be their employer as well.

There is no new field of recovery opened by this decree. This exception to the fellow-servant doctrine has been long and well established (*Prosser, Torts, supra*).

Appellant next argues that the vessel could have been laid up by it at any time. No reference to the record is made to support that or other like assertions. Appellees deny such to be true.

Appellant states that appellees could quit the vessel (p. 28), but does not go on to state that the working agreement between the union, master of the boat, appellant's employee, and the crew provided that the crew members may not be discharged [A. 306]. Appellees hesitate to cite this portion of the apostles, as it is the record of the first hearing before Judge Harrison and so has no place in this record at all. The citation is made without prejudice.

III.

On the Date of the Collision, the Charter Party of September 11, 1941, Was Not in Effect, and the Bessemer Was Not Operated by the Crew Under Any Charter From Appellant, but as Employees of Appellant.

A. There Was No Charter-Party Introduced Into Evidence Upon the Trial Before Judge Hall.

The document executed October 11, 1941, Libelant's Exhibit No. 1 for identification, was "introduced for the purpose of identification only" [A. 89] and it was ordered so marked. It therefore never became part of the evidence in the case [A. 129] and is not now properly before this Court as evidence.

Anthony Di Leva, master of the Bessemer, testified that during the sardine season in question here there was not any written agreement between him and appellant [A. 95].

Therefore, the document containing the alleged waiver of liability, relied upon by appellant, is simply not in evidence and is no part of this case.

If appellant wanted the benefit of this document, it should have introduced it into evidence. But such action would have been inconsistent with their position before Judge Hall that the Bessemer's crew were employees.

B. The Acts and Admissions of Appellant Established Beyond Doubt That the Crew of the Bessemer Were Its Employees, and That the Crew of the Bessemer Were Not Employees of Any Charterer of the Bessemer.

The admissions of the Answer to the Fifth Amended Libel, paragraphs I, II, III and IV [A. 28-31], are clear and unequivocal that the master and entire crew of the Bessemer were employees of appellant and that the "right

to control of the crew and master remained in respondent, Van Camp Sea Food Company, Inc., and was at all times exercised by said respondent" [A. 28]. In paragraph I [A. 28], appellant "denies that libelant was in possession of said vessel in any capacity other than that of an employee of respondent."

Such an employer-employee relationship is entirely inconsistent with an owner-charterer relationship between the appellant and the master and crew of the Bessemer; and the appellant, having admitted and treated appellees as employees, cannot, in the next breath, claim they are only charters, to escape just liability for the torts of other employees.

No clearer language, that the appellant did not demise or bareboat charter the Bessemer to appellees, can be found than in paragraph V of the Answer [A. 31]:

> "Respondents deny that said respondent Gennaro Di Leva was a demise or bareboat charterer or chartered the vessel in any manner whatsoever, *but allege that the said vessel Gloria R was being operated on shares in the same manner as said vessel Bessemer was being operated.* . . ."

C. The Appellant Did Not Plead the Waiver of Liability Clause in the Purported Charter of October 11, 1941.

There was no issue as to the waiver of liability clause of the purported charter of October 11, 1941, in that the appellant did not plead the same, or its legal effect, in any manner in its answer to the Fifth Amended Libel [A. 28-36]. Not being plead, any argument as to it now is on a point outside the issues. It certainly is an affirmative defense, which must be pleaded. Under no circumstances, can the point be raised on appeal for the first time.

IV.

The District Court Was Correct in Finding That the Gloria R Was Solely at Fault in the Collision.

A. The Bessemer Had a Proper Lookout and the Gloria R Was at All Times Observed by the Bessemer.

The Gloria R was at all times observed by the master of the Bessemer, who first saw the Gloria R when the vessel was two or three miles away [A. 81], he saw the Gloria R all the time after that. As Di Leva, master of the Bessemer, testified:

> "I seen him all the time. I was listening for the fish, and I observed his course. We made a circle, he was heading toward the Island, and while we were circling the fish, his course was to the east end all the time. . . . Then as we started to make the clockwise turn, he headed out in this direction here. . . . I seen his red light all the time [A. 81-82]. . . . We were completing our circle here. All of a sudden—*I was looking at them all the time*—I seen his red and green. . . . All of a sudden he turned his green lights towards us. Then I hollored at my father to back up [A. 83]. . . . All of a sudden he turned, he changed his course to cut across our bow, he came like this right straight in front of our bow" [A. 84].

The master of the Bessemer acted as a lookout. He was the mastman [A. 98], stationed on the top mast. He was on the lookout for fish, but he "seen the Gloria R all the time" [A. 91]. He gave orders concerning the navigation of the Bessemer.

This testimony establishes beyond doubt that the master of the Bessemer personally kept a proper lookout, that he

was stationed high upon the mast where he had perfectly unobstructed vision, and that he had the Gloria R under continuous observation at all times. Therefore, Article 29 of the International Rules was fully complied with by the Bessemer.

If a point be made that the lookout was not stationed on the forward deck, our answer is that the placement of the lookout is immaterial so long as he has unobstructed and clear vision. *The Lake Monroe,* 270 Fed. 858, Aff. 271 Fed. 474, is precisely in point. As said the Court there (270 Fed. 862):

> "Under the decision in *The Scagmore,* 247 Fed. 743 (C. C. A. 1st), probably the steamer's lookout should have been posted in the forward deck, but that fault, if fault it were, in no way entered into the accident. There was no failure of lookout on either vessel. Each seasonably discovered the other, and kept the other under continuous observation. The dispute is as to the courses the vessels took."

B. The Bessemer Did Not Fail to Exercise Due Care in Any Special Circumstance Situation.

The appellant attempts to make much of the fact that at times the Bessemer circled clockwise over the fish. But the evidence was clear that in looking for fish or in attempting to round them up or to get in the most favorable position for lowering the net, the Bessemer was free to turn in any manner whatsoever and that there was no "custom," as claimed by appellant [A. 97, 98, 126, 127]. The only customary thing was that when a set was commenced to be made by the lowering of the net into the water, it was done from the port side of the vessel by a counter-clockwise movement of the vessel. At the time of the collision,

the Bessemer had not commenced to lower her net. Furthermore, the circle to the right of the Bessemer was commenced before the Gloria R approached, and the Bessemer was completing that circle when the Gloria R changed her course and cut across the Bessemer's bow [A. 83].

In so far as the red mast light is concerned, the evidence was conflicting as to whether there was a local custom that the red mast light should be lit when fish were located, or only when the net was actually lowered in the water [A. 110, 111]. The master of the Gloria R admitted that there was no custom; that "They do it both ways" [A. 151]. At any rate, the Bessemer was at all times observed by the Gloria R, and the absence of a red mast light gave the Gloria R no cause to alter her course and cut across the bow of the Bessemer and so collide with the Bessemer.

C. The Evidence Affirmatively Shows Without Conflict That the Absence of a White Mast Light Could Not Have Been a Cause of the Collision.

The master of the Gloria R, Di Leva, who was in the crow's nest on the mast of the Gloria R the night of the collision [A. 135], testified that when his vessel *approached* the Island, he saw the green running lights of the Bessemer; that the bow of the Bessemer was in an easterly direction; that the Bessemer was about a mile away then [A. 137], at position No. 1 on Respondent's diagram [A. 139]; at position No. 2 on the diagram, the Bessemer was in the same position, "all we seen was his green light" [A. 139]; the Bessemer was always in one position with her bow in easterly direction, and "we could have cleared her stern by a good 50 feet" [A. 141-143]. The Court asked the master of the Gloria R:

"Did you see the Bessemer *at all times?* A. Yes." [A. 148.]

The master of the Gloria R further testified that on the way home he was looking for fish, and that once in a while he would look over and see the Bessemer, see his green light always; and as the Gloria R came homewards, the master knew that his course would bring him close to the Bessemer [A. 150]; he had passed the Bessemer by a mile going out, and could have cleared him, as only the two boats were there [A. 150].

"Court: You saw him there and you saw the boat? A. That is right." [A. 151.]

Jacob Pugliese, who was stationed at the bow of the Gloria R [A. 155], testified that as the Gloria R proceeded north towards San Pedro, he saw the green light of the Bessemer and could faintly see the shape of the boat [A. 155], about a mile away [A. 159].

Nicola Curci, the lookout of the Gloria R, was standing next to the wheel, *saw the Bessemer one mile away* [A. 166].

Biago Cummo, the wheelman of the Gloria R, first saw the Bessemer *a mile ahead* [A. 174, 175].

In *Lind v. U. S.,* 156 F. (2d) 231, the libelant's fishing vessel did not carry mast lights as required by 79(d) (First) of Title 33 U. S. C. A. for a vessel engaged in traveling; *i. e.,* in place of a mast head light, a "tri-colored lantern." She was run down by respondent's vessel, and because of the absence of the required mast light, the District Court divided the damages. The Circuit Court reversed, holding as follows:

"The whole case turns on the 'Mary's' fault . . . the failure to carry the regulation light was relevant

> only so far as its presence misled, or could have misled, those aboard the 'Doubleday' as to the 'Mary's' future positions. The 'Mary' was seen 30 minutes before the colliison when four miles away . . . the presence of a green light would not have changed the navigation of the 'Doubleday' . . . libelants have proved beyond a reasonable doubt that the failure to carry proper lights did not contribute to the collision."

A case also precisely in point is that of the *Redwood and Sun D'E* (C. C. A. 9th), 81 F. (2d) 680, where under similar facts, this Court held:

> "The cross-appellant charges that the 'Sun D'E's' lights were in accordance with the Inland Rules of Navigation and not in accordance with the International Rules . . . and cross-appellee admits this to be true. However, the court found that the 'Sun D'E's' lights were in place and burning brightly. Moreover, it affirmatively appears from the testimony that the non-compliance with the International Rules in this instance could not possibly have caused the accident, for cross-appellant's witnesses saw the 'Sun D'E' when she was about half a mile away and any purpose served by the lights could not have aided more than an actual view of the vessel."

When the Bessemer and Gloria R were red to red, the Gloria R was obligated to hold her course. The presence or absence of a white mast light could have in no manner changed the obligation of the Gloria R to so navigate. The absence of a white mast light could not have possibly caused him to cross the bow of the Bessemer, as the Court found the Gloria R did [A. 43]. Therefore, damages should not be divided.

V.

The District Court Did Not Err in Computing Damages.

Libelant placed in evidence a statement from the Division of Fish and Game of the State of California, Libelant's Exhibit No. 3 [A. 130], which set forth the daily catch of sardines of the Bessemer from October 14, 1944 to December 31, 1944, according to the daily deliveries of the vessel.

Judge Hall computed damages as follows [A. 194]: He took October and November as average months; from October 14th to the end of November was 45 calendar days; *i. e.,* while they did not fish every day, there is a total number of 45 days and a total quantity of fish of 1,047,450 plus 896,850, and 45 days into that total quantity of fish was an average of 43,206 pounds of fish caught each day. That is not a fishing day, that is a day [A. 194] . . . for 10 calendar days lost by the Bessemer [4th to 13th, inclusive], 432,000 pounds of fish, 216 tons at $22.00 a ton would make $4,752.00 [A. 196].

Judge Hall expressly refused to compute damages as contended for by appellant [A. 194-197, 202-203].

The deduction for fuel was based upon an agreed sum of $406.55 for the 45 days chosen by the Court. This averages to $90.34 for 10 days [A. 198].

Gross damage	$4,752.00
Less fuel—10 days	90.34
	$4,661.66

The next computation is to divide the remaining amount into 18¾ shares. This gives a result of $248.62 per share [A. 199].

The grocery bill for the 45 days was agreed to be $550.00. This was for 13 men. This would average to be $12.22 per day for 13 men, or $.94 per day for one man, or $9.40 per man for 10 days.

Crewman's share	$248.62
Less groceries, 10 days	9.40
Clear per share	$239.22

The master, Anthony Di Leva, received one share, $239.22, plus one-half share from vessel, which stood no groceries.

Crewman's share, clear	$239.22
Bonus—½ boat share	124.31
Master's earnings	$363.53

The owner of the net took 2½ shares of the boat's shares, and stood no groceries, and so received $621.65.

Appellees submit that the method used by the Court was a fair one. If anything, the method is too favorable to the appellants, because during the time from October 14 to November 30, 1944, there were Saturdays, Sundays, and a week of full moon, during all of which days the vessels do not go out for fish. So the catch from October 14 to November 30 should be divided by a figure considerably less. If such were the method used, then there would be sense to using the number of fishing days lost by the Bessemer. But the Court used the calendar day count, and his discretion in this matter should not be disturbed.

As stated in *Atchison, T. & S. F. Ry. Co. v. California Sea Foods Co.,* 51 F. (2d) 466 (C. C. A. 9th), there must be proven a reasonable certainty of pecuniary loss, and not a mere inconvenience arising from an inability to use the vessel. Appellees sustained this burden. The collision took place on the first day of the sardine season. Appellees proved that they consistently caught fish the remaining days of the season in 1944 [Libelant's Exhibit No. 3]. Appellees further proved that during the days the Bessemer was laid up for repairs, other seiners came in with full loads [A. 85-86]. Appellee thus put the Bessemer within the rule of *The Columbia,* Fed. Cas. No. 3,035, cited with approval in the *Atchison* case, *supra,* where allowance was made for the catch lost because the accident happened "at the height of the fishing season."

Respectfully submitted,

Herbert R. Lande,
Proctor for Appellees.